STATE OF MICHIGAN
IN THE SUPREME COURT
[Sawyer, P. J., Hoekstra and O'Brien, J.J.)

VANESSA OZIMEK, Plaintiff-Appellant vs.	Supreme Court No. Court of Appeals No. 331726
LEE J. RODGERS, Defendant-Appellee.	Wayne County Circuit Court-Family Div. Case No. 13-109046-DC

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APPLICATION FOR LEAVE TO APPEAL AFTER REMAND TO COURT OF APPEALS

Ozimek v Rodgers, __ Mich App __ (2016)

October 7, 2016 Court of Appeals Order Denying Reconsideration

Jurisdictional Issue: Post-judgment appeal of right under MCR 7.202(6)(a)(iii)

Proof of Service

RELATED APPEALS:

Marik v Marik, Supreme Court No. 154549

Madson v Jaso, Supreme Court No. 154529

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ORDER BEING APPEALED

Plaintiff-Appellant Vanessa Ozimek appeals the Court of Appeals published decision after remand from this Court dismissing her appeal of right for lack of jurisdiction under MCR 7.202(6)(a)(iii). See Exhibit A, *Ozimek v Rodgers*, __ Mich App __ (August 25, 2016); Exhibit A-1, October 7, 2016 Court of Appeals Order denying Reconsideration.

The underlying Opinion and Order entered by the trial court constitutes a post-judgment order affecting the custody of a minor under MCR 7.202(6)(a)(iii), and is a final order appealable by right. See Exhibit C, 2/8/16 Opinion and Order.

STATEMENT OF QUESTIONS INVOLVED

I. Should leave to appeal be granted to address construction of a court rule and a fundamental jurisdictional issue affecting a significant number of domestic relations appeals: whether a post-judgment order addressing legal custody "affects" custody and is a final order under MCR 7.202(6)(a)(iii) for purposes of filing an appeal of right? The language of the court rule is broad. Under the Child Custody Act and long-standing law, custody includes physical and legal components.

Here, the Court of Appeals in a published opinion has held that legal custody decisions do not affect custody for purposes of the jurisdictional rule. The decision has sweeping effect and has been used to dismiss an appeal of right from a post-judgment order terminating joint legal and granting sole legal custody. The trial court's order here affects the custody of a minor child. There needs to be consistency in the Court of Appeals determination of jurisdiction – and now there is more uncertainty than before.

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Appellant answers YES.

The Court of Appeals dismissed the appeal of right in a published decision.

Summary of Argument and Reasons for Granting Leave

In *Ozimek v Rodgers*, ___ Mich App __ (2016), the Court of Appeals issued a blanket holding that post-judgment orders concerning legal custody do not fall within MCR 7.202(6)(a)(iii).[1] The panel argues that the court rule does not expressly indicate that it includes the concept of "legal" custody. "Had the Supreme Court intended for the court rule to include "legal" custody, it would have included the term. Absent that specific language, this Court should not broadly interpret the court rule." Exhibit A, *Ozimek*, slip op. at p. 6. The panel then asserts (inaccurately) that the Court of Appeals has not traditionally included legal custody considerations in the interpretation of MCR 7.202(6)(a)(iii).

But *Ozimek* also questions its analysis and requests that this Court address the issue:

> "Given the lack of clarity regarding whether legal custody should be included in the definition of custody in MCR 7.202(6)(a)(iii), we urge our Supreme Court to weigh in on the issue. Further, should practitioners wish to promote an expanded court rule, our Supreme Court would be the proper venue for that request." *Ozimek*, p. 6-7.

This Court should grant leave concerning this fundamental jurisdictional issue.

Legal custody is a fundamental and indivisible part of being a parent:

Child custody in Michigan is governed by the Child Custody Act, MCL 722.21 *et seq.* In *Grange Insurance v Lawrence*, 494 Mich. 475, 511, 835 NW2d 363 (2013), this Court recognized the dual aspects of custody - **both physical and legal**, citing MCL 722.26a of the Child Custody Act:

> "Moreover, the Act allows for myriad possible scenarios in postdivorce familial relationships, recognizing different combinations of legal and physical custody, and offering

[1] A final judgment/order appealable as of right includes: "in a domestic relations action, a postjudgment order *affecting* the custody of a minor." MCR 7.202(7)(a)(iii)(emphasis added).

> flexibility in terms of parenting time arrangements." *Id*. at 507-508 (fn 67 referencing MCL 722.26(a)). [footnotes omitted][2]

Custody inherently includes all the aspects of parenting.

Legal custody is the decision-making authority as to the important decisions concerning a child. MCL 722.26(a)(7). And regardless of what it is called, parental decision-making concerning children goes to the very heart of what is custody. The decisions we make for our children fundamentally affect who they become. See *Troxel v Granville*, 530 US 57, 120 S.C. 2054, 147 L Ed 2d 49 (2000) (discussing the various aspects of parental custody: care, custody and control protected by the Constitution, including associational and other significant decisions). As recognized in *Troxel*, a child's education is one of those important decisions. 530 US at 65, citing *Meyer* v. *Nebraska*, 262 U. S. 390, 399, 401 (1923). In *Meyer*, the U.S. Supreme Court held that the "liberty" protected by the Due Process Clause includes the right of parents to "establish a home and bring up children" and "to control the education of their own."

The Ozimek decision conflicts with previous published decisions of the Court of Appeals broadly interpreting MCR 7.202(6)(a)(iii):

The Court of Appeals - in previous published cases - has broadly construed the words "affecting custody" in MCR 7.202(6)(a)(iii) to include a variety of orders. See *Wardell v Hincka*, 297 Mich App 127, 132-133; 822 NW2d 278 (2012) (order *denying* change in custody is a final

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[2] MCL 722.26(a)(7) provides:

> As used in this section, "joint custody" means an order of the court in which 1 or both of the following is specified:
> (a) That the child shall reside alternately for specific periods with each of the parents.
> (b) That the parents shall share decision-making authority as to the important decisions affecting the welfare of the child.

order under the rule); *Rains v Rains*, 301 Mich App 313, 321-322; 836 NW2d 709 (2013)(an order in a domestic relations action need not change the custody of a minor to affect custody). See also *Varran v Granneman*, __ Mich App ___ (2015) (order concerning grandparenting time affects custody, including legal decision-making authority of parents to determine children's associations). *Wardell*, *supra*, interprets the MCR 7.202(6)(a)(iii) language "affecting custody" and the "context in which the term is used" as broadly encompassing a wide range of orders, including orders that deny changes in custody. *Wardell*, 297 Mich at 132-133.

The Court of Appeals, contrary to the statement made in *Ozimek*, has accepted appeals of right from post-judgment orders affecting "legal" custody and parental decision-making. *See Parent v Parent*, 282 Mich App 152, 153; 762 NW2d 553 (2009); *Pierron v Pierron*, 282 Mich App 222; 765 NW2d 345 (2009), *aff'd* 486 Mich 81 (2010). *Dailey v Kloenhamer*, 291 Mich App 660, 811 NW2d 501 (2011) was an appeal of right from a post-judgment order modifying joint legal custody to sole legal custody to Defendant.

Recently, the Court of Appeals dismissed an appeal of right from a post-judgment order modifying legal custody. See Exhibit E, *Riemer v Johnson*, October 5, 2016 Order (COA docket no. 334934). As stated in the jurisdictional dismissal order:

> "[a]n order that only affects legal custody of a child, without affecting physical custody, is not an order affecting 'custody' within the meaning of that term as used in MCR 7.202(6)(a)(iii). Ozimek v Rodgers

There appears to be a conflict between published Court of Appeals decisions. At a minimum, there is confusion and inconsistency in the Court of Appeals' treatment of these orders.

Conclusion: Parental decisions concerning children are child custody; effect on a child's environment

The important decisions concerning children: education, religion, and with whom they

associate are the core of both parental duty and parental right. Many, if not most, family practitioners believe that "legal" custody is more significant – or at least as significant – as physical time in terms of parenting.

Ozimek attempts to make distinctions based on physical placement of children. There is no requirement, however, in the court rule that there be a physical effect. And, all orders affect the physical environment of children (including the schools and communities in which they are placed or those they associate with), although again physical effect is not required for determining what affects the "custody" of a child under the language of the rule. And even though not required by the court rule, parental decisions inherently affect a child's established custodial environment, which is not simply a physical environment, but also a "psychological environment" created through appropriate and mature decision-making and based on whom a child looks to for guidance and leadership. See *Berger v Berger*, 277 Mich App 700, 706, 747 NW2d 336 (2008) (discussing parental care, attention and guidance as crucial to an established custodial environment). Here, the trial court denied Plaintiff's motion to enroll the child in Livonia schools, finding, based on the testimony, that the child had an established custodial environment with both parties and the proposed change in schools would affect that established custodial environment, and the child would not "enjoy the same family dynamic." Exhibit C, Trial Court Opinion and Order, p. 3.

MCR 7.202(6)(a)(iii) does not limit the definition of "custody." The Court of Appeals has arbitrarily redefined and limited custody under the rule to "physical custody" or requiring a physical effect, contrary to Michigan law and the United States Supreme Court's recognition of parental decision-making, care and control as fundamental components of parental custody.

Decisions concerning where children attend school and how and by whom they are educated

are part of a continuum of the associational decisions made by parents and affect a child's "custody" and upbringing in multiple ways. Michigan parents understand that their decisions concerning their children are a fundamental part of child custody. Post-judgment orders addressing these decisions are encompassed within MCR 7.202(6)(a)(iii).

STATEMENT OF FACTS

The parties in this case are joint legal custodians of a minor son, now age 9. On July 30, 2014, the trial court entered a Final Order for Custody awarding the parties joint physical and joint legal custody. See Exhibit F, Register of Actions.

On or about July 20, 2015, Plaintiff-Appellant Vanessa Ozimek filed a Motion for Child to Attend Livonia Schools. Ms. Ozimek, as well as being a joint legal custodian, is the primary physical custodian of the minor child. Ms. Ozimek and the child moved to Livonia, Michigan in May 2015. Defendant-Appellee lives in Riverview, Michigan. The child, however, attends school in a district - Allen Park - where neither party lives.[3]

Ms. Ozimek argued that it is in the best interest for the minor child to attend school in Livonia. In her motion and at the evidentiary hearing, Plaintiff stated that the Livonia Public School system is significantly superior to Allen Park, neither party lives in Allen Park, she has primary physical custody during the week,[4] and the child would be going to school where he lives.

Additionally, Ms. Ozimek works in Livonia and her fiancé is a Livonia fire-fighter. Ms. Ozimek and her fiancé are now married and she, her husband, and her son, continue to live in Livonia approximately one-mile from the school the child would attend.

Hearings:

A three-day evidentiary hearing was held on Plaintiff's motion on September 17, October 9,

[3] The child was in an Allen Park school as a school of choice because both parties were then living in nearby districts with inferior school systems. See e.g. Motion for Child to Attend Livonia Schools, attached as Exhibit D.

[4] Defendant has parenting time every Thursday after school until 8pm and every other weekend Friday after school until Sunday at 6pm. The parties rotate holidays.

and October 30, 2015.

Ms. Ozimek testified that she has been the primary custodial parent. Tr. 9/17/15, pp. 14-17 (Defendant's parenting time: 6 days per month), 30 (she takes child to dentist, doctor). The child was originally enrolled in Allen Park Schools because it was a better district than the districts where either party was living at the time of original enrollment. *Id* at 20. She has signed the child up for extracurricular activities and she works with him on homework. *Id* at 20-24. She is the person the school calls if the child is sick. Id at 28.

The Michigan Department of Education school rankings for 2013/2014 listed Arnold Elementary in Allen Park (the child's current school) at 47% and the proposed school – Grant Elementary – in Livonia at 69%. The exhibit showing school rankings (Plaintiff's Exhibit 1) was admitted. Tr. 9/17/15, p. 37. Plaintiff entered a series of records indicating that the Livonia school was superior to the Allen Park school. See Plaintiff's Exhibits 1-5 (entered at Tr. 9/17/15, pp. 37, 38, 40, 50, 59). Both parties testified as to their involvement with the child.

The child would be graduating from his current school in a year, and Plaintiff testified that with the change in schools he would not have to commute long distances to school and would live in the same community where he was attending school.

On February 8, 2016, the trial court denied Plaintiff's motion and ordered the child remain enrolled in Allen Park schools. See Opinion and Order of the Court re: Motion to Change the Minor Child's School District, attached as Exhibit C. The court stated that it found, based on the testimony, that the child had an established custodial environment with both parties and the proposed change in schools would affect that established custodial environment, and the child would not "enjoy the same family dynamic." Exhibit C, p. 3. The trial court then found that Ms. Ozimek had to support

a change in school by "clear and convincing evidence." *Id*. The trial court then addressed four of the best interest factors of the Child Custody Act, (although previously stating that the only issue was what was the best school).

On February 29, 2016, Plaintiff-Appellant filed a claim of appeal from the February 8, 2016 trial court order. See Docket No. 331726. On March 8, 2016, the Court of Appeals dismissed the appeal of right for lack of jurisdiction. On March 29, 2016, Ms. Ozimek filed a motion for reconsideration under MCR 7.203(F)(2). On April 22, 2016, the Court of Appeals denied reconsideration. See Exhibit B, COA 3/8/16 & 4/22/16 orders.

Appellant then appealed to this Court, which remanded the jurisdictional issue to this Court to address whether the order was a final order under MCR 7.202(60(a)(iii). Michigan Supreme Court Docket No. 153836.

On remand, the Court of Appeals found that the language of MCR 7.202(6)(a)(iii) does not include "legal" custody and post-judgment orders affecting "legal" custody are not considered final orders. *Ozimek v Lee*, __ Mich App __ (2016)((August 26 2016; Docket No. 331726) (Exhibit A). Plaintiff filed a timely motion for reconsideration which the panel denied on October 7, 2016. See Exhibit A-1.

On October 28, 2016, Plaintiff-Appellant filed an application for leave to file a late appeal pursuant to MCR 7.205(G)(5) in the Court of Appeals from the trial court Opinion and Order denying her motion in order to preserve all of her appellate rights. See COA docket no. 335459.

Appellant Vanessa Ozimek now files this application for leave to appeal from the Court of Appeals decision on remand *(Ozimek v Rodgers*, Exhibit A) dismissing her appeal of right.

ARGUMENT

Leave should be granted to address court rule construction and a fundamental jurisdictional issue affecting a significant number of domestic relations appeals: whether a post-judgment order addressing legal custody "affects" custody and is a final order under MCR 7.202(6)(a)(iii) for purposes of filing an appeal of right. The language of the court rule is broad. Under the Child Custody Act and long-standing law, custody includes physical and legal components.

Here, the Court of Appeals in a published opinion has held that legal custody decisions do not affect custody for purposes of the jurisdictional rule. The decision has sweeping effect and has been used to dismiss an appeal of right from a post-judgment order terminating joint legal and granting sole legal custody. The trial court's order here affects the custody of a minor child. There needs to be consistency in the Court of Appeals determination of jurisdiction – and now there is more uncertainty than before.

Standard of Review:

The grant of leave to appeal is discretionary. MCR 7.301(A); MCR 7.302. This application involves a significant jurisdictional issue which affects a large number of domestic relations appeals – what constitutes a final order "affecting custody" under MCR 7.202(6)(a)(iii). The issue involves access to the courts, and more specifically, access to the appellate courts through an appeal of right which guarantees appellate review.

Argument:

MCR 7.202(6)(a)(iii) provides that a post-judgment order "affecting" the custody of a minor is a final order appealable by right.[5]

Parental Decision-Making ("legal" Custody) is a fundamental component of custody

Child custody is governed by the Child Custody Act, MCL 722.21, *et seq*. Under the Act,

[5] In this case, the July 30, 2014 Order for custody is the first order disposing of all claims or issues between the parties, and constitutes the "final judgment" or "final order" under MCR 7.202(6)(a)(i).

custody is comprised of legal and physical components. See MCL 722.26(a)(7) (joint custody).[6] In *Grange Ins. Co v Lawrence*, 494 Mich 475, 507-509, 835 NW2d 363 (2013), this Court discussed MCL 722.26a)(7), recognizing the dual aspects of custody – both physical and legal. *Grange* involved a determination of a child's domicile for purposes of the No-Fault Act. As part of determining domicile, the Court analyzed parental custody and related orders under the Child Custody Act:

> "In directing courts to abide by the custody order, we are cognizant that the Child Custody Act draws a distinction between physical custody and legal custody: Physical custody pertains to where the child shall physically "reside," whereas legal custody is understood to mean decision-making authority as to important decisions affecting the child's welfare." *Id*. at 511.

Legal custody is the decision-making authority as to the important decisions concerning a child. And regardless of what it is called, parental decision making is a fundamental part of parental custody of a child. A child's education is one of the important decisions made by parents. In *Meyer* v. *Nebraska*, 262 U. S. 390, 399, 401 (1923), the U.S. Supreme Court held that the "liberty" protected by the Due Process Clause includes the right of parents to "establish a home and bring up children" and "to control the education of their own." See *Troxel v Granville*, 530 US 57, 120 S.C. 2054, 147 L Ed 2d 49 (2000) (discussing the various aspects of parental care, custody and control protected by the Constitution).

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[6] MCL 722.26(a)(7) provides:

As used in this section, "joint custody" means an order of the court in which 1 or both of the following is specified:

(a) That the child shall reside alternately for specific periods with each of the parents.
(b) That the parents shall share decision-making authority as to the important decisions affecting the welfare of the child.

The Ozimek decision conflicts with other Court of Appeals decisions and orders:

The Court of Appeals - in published cases - has broadly construed the words "affecting custody" in MCR 7.202(6)(a)(iii). See *Wardell v Hincka*, *supra*, 297 Mich App 127, 132-133; 822 NW2d 278 (2012) (order *denying* change in custody is a final order under the rule); *Rains v Rains*, 301 Mich App 313, 321-322; 836 NW2d 709 (2013)(an order in a domestic relations action need not change the custody of a minor to affect custody). In *Wardell v Hincka*, the Court of Appeals analyzed the language of MCR 7.202(6)(a)(iii), holding that an order denying a post-judgment motion for change of custody comes within the rule:

> Black's Law Dictionary defines "affect" as "[m]ost generally, to produce an effect on; to influence in some way." Black's Law Dictionary (9th ed), p 65. In a custody dispute, one could argue, as plaintiff does, that if the trial court's order does not change custody, it does not produce an effect on custody and therefore is not appealable of right. However, one could also argue that when making determinations regarding the custody of a minor, a trial court's ruling necessarily has an effect on and influences where the child will live and, therefore, is one affecting the custody of a minor. Furthermore, the context in which the term is used supports the latter interpretation. *MCR 7.202(6)(a)(iii)* carves out as a final order among postjudgment orders in domestic relations actions those that affect the custody of a minor, not those that "change" the custody of a minor. As this Court's long history of treating orders denying motions to change custody as orders appealable by right demonstrates, a decision regarding the custody of a minor is of the utmost importance regardless of whether the decision changes the custody situation or keeps it as is. We interpret *MCR 7.202(6)(a)(iii)* as including orders wherein a motion to change custody has been denied.

Rains v Rains, 301 Mich App 313, 321-322; 836 NW2d 709 (2013) follows *Wardell*, holding that a post-judgment order denying a motion for a change of domicile and modifying the parenting-time schedule is a final order under MCR 7.202(60(a)(iii). *Rains* emphasizes that an order in a domestic relations action need not change the custody of a minor to affect it. On the contrary, by maintaining the status quo, a denial of a motion implicating custody necessarily affects custody. *Id.* at 323-324.

Lombardo v Lombardo, 202 Mich App 151, 507 NW2d 788 (1993) holds that where joint

legal custodians disagree about a major decisions concerning a child, the trial court must determine what is in the best interest of the child under the Child Custody Act, MCL 722.21. *Lombardo* involved a dispute between the joint legal custodians concerning the child's education and schooling.

The Court of Appeals has a long history of treating orders arising from disputes between joint legal custodians concerning schools as appealable by right. *Lombardo*, *supra*, was an appeal of right from a post-judgment trial court order denying the plaintiff's motion to enroll the parties' minor son in a program for gifted and talented children. *Id* at 152. *Parent v Parent*, 282 Mich App 152, 153; 762 NW2d 553 (2009) was an appeal of right from a post-judgment order granting a motion to enroll child in public school in a dispute between joint legal custodians. *Pierron v Pierron*, 282 Mich App 222; 765 NW2d 345 (2009), *aff'd* 486 Mich 81 (2010), involves a similar situation as in this case – an appeal of right from a post-judgment order maintaining children in their current district with joint legal custodians who cannot agree. The Court of Appeals in *Pierron* originally dismissed the appeal for lack of jurisdiction under MCR 7.202(6)(a)(iii), but reinstated the appeal of right on reconsideration in an order dated February 29, 2008.[7] See also *London v London*, Mich Ct App (Docket No. 325710, October 13, 2015), attached as Exhibit F. In *London*, the defendant appealed a post-judgment order granting plaintiff's motion changing the children's school district and modifying parenting time. The Court of Appeals rejected the appellee's jurisdictional challenge, finding that a determination of school districts *affects* custody, considering among other things where

[7] *Parent, Pierron* and *London* were all decided after the current amendment of MCR 7.202(6)(a)(iii). The general focus is also on how all major decisions affect the child - and the child's standpoint is crucial. *Pierron*, *supra*, 486 Mich at 92. Where a child goes to school fundamentally affects his or her environment and life. See e.g. MCL 722.23(h)(best interest factor concerning a child's school and community). And, as discussed, all of these decisions are a component of parental decision-making and custody of a child.

children attend schools, how far they will travel to school, and whether they will attend a school in a community where they reside most school nights.[8]

Recently, the Court of Appeals has dismissed appeals of right from post-judgment orders addressing educational/school issues in jurisdictional orders. See *Goriee v Daud-Goriee*, Mich Ct Ap No. 326227 (order modifying parenting time and changing the school; dismissed for lack of jurisdiction 2015); and *Tison v Tison* Mich Ct App No. 326158 (order denying request to change school; dismissed for lack of jurisdiction); attached as Exhibit G. The *Ozimek* decision references and emphasizes these orders.

But, in the recent unpublished Court of Appeals opinion in *Mellema v Mellema*, Mich Ct App No. 329206 (April 21, 2016) the court found that the trial court's order denying plaintiff's motion to change school districts was an order affecting custody under MCR 7.202(6)(a)(iii), consistent with the principles articulated in *Rains* and *Wardell, supra*. See Exhibit G, attached cases. *Mellema* presents facts very close to this case. In *Mellema*, the plaintiff wanted the children to attend Grandville Public Schools following her move to that area, and defendant wanted the children to remain enrolled in the Fremont Public School District. "Plaintiff and defendant had joint legal custody over the children, so they shared decision-making authority over important decisions concerning the children's welfare, including their education. See *Pierron*, 282 Mich App at 246-247; *Lombardo*, 202 Mich App at 159." Slip op, pg. 5. The *Mellema* panel concluded that although a change in the children's school district may not have actually involved a *change* in custody, we conclude that it

[8] *London* also cites *Wardell v Hincka*, 297 Mich App supra at 132-133 ("As this Court's long history of treating orders denying motions to change custody as orders appealable by right demonstrates, a decision regarding the custody of a minor is of the utmost importance regardless of whether the decision changes the custody situation or keeps it as is"). *London, supra*, p. 2.

would have *affected* the parties' legal custody of the children by affecting their joint decision-making authority. See *Pierron*, 282 Mich App at 246-247; *Lombardo*, 202 Mich App at 159." See *Mellema*, Exhibit C at p. 5.

In *Varran v Granneman*, 497 Mich 929, 856 NW2d 555 (2014), this Court remanded to the Court of Appeals, directing that court to decide whether a grandparenting time order affects custody within the meaning of MCR 7.202(6)(a)(iii)). In its recent published case of *Varran v Granneman*, __ Mich App __ (October 13, 2015; Docket Nos. 321866; 322437) the Court of Appeals held an order imposing grandparenting time affects custody for purposes of MCR 7.202(6)(a)(iii)). *Varran* discussed the construction of the word "affecting" in *Wardell v Hincka, supra*:

> MCR 7.202(6)(a)(iii) carves out as a final order among postjudgment orders in domestic relations actions those that affect the custody of a minor, not those that "change" the custody of a minor. *Wardell, supra,* at 132-133.

Varran, citing *Grange,* emphasizes that child custody involves both legal and physical components and MCR 7.202(6)(a)(iii) does not contain limiting or distinguishing language. Under the plain language of the rule, a "postjudgment order affecting the custody of a minor" is an order that produces an effect on or influences in some way the physical custody or legal custody of a minor. See pg. 16, opinion, attached. In *Varran*, the order granting grandparenting time affected a parent's legal custody of a child – his or her decisions concerning children, including associational decisions and decisions in general concerning a child's care, custody and control. See also *Dailey v Kloenhamer*, 291 Mich App 660, 811 NW2d 501 (2011) (appeal of right from post-judgment order modifying legal custody).

Ozimek attempts to make distinctions based on physical placement of children. There is no requirement in the court rule, however, that there be a physical effect. And, all orders affect the

physical environment of children (including the schools and communities in which they are placed or those they associate with), although again physical effect is not required for determining what affects the "custody" of a child under the language of the rule.

And even though not required by the court rule, parental decisions inherently affect a child's established custodial environment, which is not simply a physical environment, but also a "psychological environment" created through appropriate and mature decision-making and based on whom a child looks to for guidance and leadership. See *Berger v Berger*, 277 Mich App 700, 706, 747 NW2d 336 (2008) (discussing parental care, attention and guidance as crucial to an established custodial environment). Here, the trial court denied Plaintiff's motion to enroll the child in Livonia schools, finding, based on the testimony, that the child had an established custodial environment with both parties and the proposed change in schools would affect that established custodial environment, and the child would not "enjoy the same family dynamic." Exhibit C, Trial Court Opinion and Order, p. 3.

MCR 7.202(6)(a)(iii) does not limit the definition of "custody." The Court of Appeals has arbitrarily redefined and limited custody under the rule to "physical custody" – requiring a physical effect, contrary to Michigan law and the United States Supreme Court's recognition of parental decision-making, care and control as fundamental components of parental custody.

Decisions concerning where children attend school and how and by whom they are educated are part of a continuum of the associational decisions made by parents and affect a child's "custody" and upbringing in multiple ways. Michigan parents understand that their *decisions* concerning their children are a fundamental part of child custody. Post-judgment orders addressing these decisions are encompassed within MCR 7.202(6)(a)(iii).

CONCLUSION

It is time for a definitive construction of MCR 7.202(6)(a)(iii). Appellant (and other parties) have had to address jurisdictional uncertainty resulting in an expensive and confusing appellate process. Because of the wording of MCR 7.205(G)(5), Appellant felt compelled to file a late application for leave to appeal in the Court of Appeals (docket no. 335459) while the jurisdictional appeal is pending.

The February 8, 2016 Opinion and Order comes within MCR 7.202(6)(a)(iii). It is a final order appealable by right. MCR 7.203(A)(1).

RELIEF REQUESTED

Plaintiff-Appellant respectfully requests that this Court grant her application for leave to appeal to clarify the law, reverse the decision in *Ozimek v Rodgers*, and find that "legal" custody (parental decision-making) falls within MCR 7.202(6)(a)(iii) and order the Court of Appeals to take this appeal as an appeal of right, or grant any other relief deemed appropriate.

Respectfully submitted,

/s/ Anne Argiroff
Anne Argiroff P37150
Attorney for Plaintiff-Appellant

Dated: November 18, 2016

PROOF OF SERVICE

On the date below, a copy of this Application for Leave to Appeal package was served on Defendant-Appellee at the address of his counsel by first-class mail.

/s/ Anne Argiroff **Dated**: November 18, 2016
Anne Argiroff
Attorney for Appellant